Supreme Court, U.S.
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No. 04-131

IN THE

Supreme Court of the United States

PACIFIC GAS AND ELECTRIC CO. AND PG&E CORP.,

Petitioners,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this Court lack subject matter jurisdiction to decide the question allegedly presented in the petition because petitioner Pacific Gas and Electric Co. ("PG&E") has now implemented a confirmed reorganization plan based on a settlement, and any dispute over PG&E's prior and now superseded proposed reorganization plan of December 19, 2001, is therefore moot?

2. Does the "notwithstanding" clause in section 1123(a) of the Bankruptcy Code, 11 U.S.C. § 1123(a), expressly preempt all nonbankruptcy laws—including civil and criminal laws, and federal, state, and local laws—that are applicable to implementation of a confirmed plan of reorganization or liquidation under chapter 11?

RULE 29.6 STATEMENT

No respondent is a nongovernmental corporation.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 11

I. THIS CASE IS NOT A SUITABLE VEHICLE FOR RESOLUTION OF THE QUESTION PRESENTED .. 11

A. The Dispute Allegedly Underlying the Petition Is Likely to Become Indisputably Moot During the Pendency of This Court's Review 11

B. Certiorari Should Be Denied Because of the Substantial Argument That the Case Is Already Moot 14

II. THE NINTH CIRCUIT'S HOLDING DOES NOT CONFLICT WITH ANY HOLDING OF ANY COURT OF APPEALS 14

III. THE NINTH CIRCUIT REACHED THE CORRECT RESULT 20

A. This Court's Decision in *Holywell Corp.* v. *Smith* Supports Respondents' Position 20

B. The Decision Below Does Not Conflict with Other Holdings by the Courts of Appeals or this Court Interpreting Different "Notwithstanding" Clauses in Different Statutes 21

C. The Decision Below Does Not Conflict with Cases Cited by Petitioners Involving a Canon of Construction That Is Inapplicable Here 23

D. The Ninth Circuit Properly Construed Section 1123(a) in Light of Applicable Presumptions Against Preemption 25

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

BFP v. *Resolution Trust Corp.*, 511 U.S. 531 (1994) 25

Butner v. *United States*, 440 U.S. 48 (1979) 29

Cipollone v. *Liggett Group, Inc.*, 505 U.S. 504 (1992) .. 24, 25

Cisneros v. *Alpine Ridge Group*, 508 U.S. 10 (1993) 23

City of Columbus v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002) 24, 25

Cliff v. *Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113 (11th Cir. 2004) 23

Conoco, Inc. v. *Skinner*, 970 F.2d 1206 (3d Cir. 1992) 23

Engine Mfrs. Ass'n v. *S. Carolina Air Quality Mgmt. Dist.*, 124 S. Ct. 1756 (2004) 25

FCC v. *NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003) 28

First Nat'l Bank v. *Allen*, 118 F.3d 1289 (8th Cir. 1997) 16

First Union Nat'l Bank v. *Gibbons (In re Princeton-N.Y. Investors, Inc.)*, 219 B.R. 55 (D.N.J. 1988) 19

Hillis Motors, Inc. v. *Haw. Auto. Dealers' Ass'n*, 997 F.2d 581 (9th Cir. 1993) 16

Hisquierdo v. *Hisquierdo*, 439 U.S. 572 (1970) 23

Holywell Corp. v. *Smith*, 503 U.S. 47 (1992) 20, 21

Huron Portland Cement Co. v. *City of Detroit*, 362 U.S. 440 (1960) 26

In re Clarksville Hospitality Corp.,
No. 93-17668-CJK, 1996 Bankr. LEXIS 340
(Bankr. D. Mass. Apr. 4, 1996) 19

In re Equitable Office Bldg. Corp.,
72 S. Ct. 1086 (1946) (Reed, J., in chambers)..... 16

In re Kizzac Mgmt. Corp.,
44 B.R. 496 (Bankr. S.D.N.Y. 1984)..... 19

In re PG&E, Dec. 03-02-035, 2003 WL 548951
(Cal. Pub. Util. Comm'n Feb. 13, 2003) 2

In re PG&E, Dec. 03-12-035, 230 P.U.R. 4th 101,
2003 WL 23104229 (Cal. Pub. Util. Comm'n
2003), *petitions for writ of review filed sub nom.
Aglet Consumer Alliance* v. *Pub. Util. Comm'n*,
No. A106157 (Cal. Ct. App. filed Apr. 15, 2004),
and City & County of San Francisco v. *Pub.
Util. Comm'n*, No. A106158 (Cal. Ct. App.
filed Apr. 15, 2004) 10, 13

In re PG&E, 304 B.R. 395 (Bankr. N.D. Cal. 2004),
appeal dismissed sub nom. Lynch v. *Cal. Pub. Util.
Comm'n*, 311 B.R. 798 (N.D. Cal. 2004), *appeal
docketed*, No. 04-16493 (9th Cir. July 29, 2004),
and appeal docketed sub nom. City of Palo Alto v.
PG&E, No. 3:04-CV-00727 VRW (N.D. Cal.
Feb. 23, 2004)..... 9, 10

In re S. Cal. Edison Co., Dec. 01-01-046,
206 P.U.R. 4th 141, 2001 Cal. PUC LEXIS 113
(Cal. Pub. Util. Comm'n 2001) 5

In re Union Golf of Fla., Inc.,
242 B.R. 51 (Bankr. M.D. Fla. 1998)..... 20

In re Wabash Valley Power Ass'n, Inc.,
No. 85-2238-RWV-1, 1991 WL 11004220
(Bankr. S.D. Ind. Aug. 7, 1991) 20

Integrated Solutions, Inc. v. *Serv. Support Specialties, Inc.*, 124 F.3d 487 (3d Cir. 1997) 18

Long Island R.R. v. *Aberdeen & Rockfish R.R. Co.*, 439 U.S. 1 (1978) 23

Lorillard Tobacco Co. v. *Reilly*, 533 U.S. 525 (2001) 23

Lynch v. *Cal. Pub. Util. Comm'n*,
No. C-04-0580 VRW, 2004
WL 793530 (N.D. Cal. Apr. 9, 2004) 12

Medtronic, Inc. v. *Lohr*, 518 U.S. 470 (1996) 25, 26

Midlantic Nat'l Bank v. *N.J. Dep't of Envtl. Prot.*, 474 U.S. 494 (1986) 7, 25, 27, 29

Morton v. *Mancari*, 417 U.S. 535 (1974) 27

NLRB v. *Bildisco & Bildisco*, 465 U.S. 513 (1984) 16

New York v. *FERC*, 535 U.S. 1 (2002) 25

Oregon Natural Res. Council v. *Thomas*, 92 F.3d 792 (9th Cir. 1996) 23

PG&E v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) 26

Palmer v. *Massachusetts*, 308 U.S. 79 (1939) 25

Patterson v. *Shumate*, 504 U.S. 753 (1992) 5, 23

Pub. Serv. Co. of N.H. v. New Hampshire (In re Pub. Serv. Co. of N.H.), 108 B.R. 854 (Bankr. D.N.H. 1982) 19

Renne v. *Geary*, 501 U.S. 312 (1991) 14

SEC v. *Med. Comm. for Human Rights*,
404 U.S. 403 (1972) 14

S.S. Retail Stores Corp. v. Ekstrom (In re S.S. Retail Stores Corp.), 216 F.3d 882 (9th Cir. 2000) 13

Shomberg v. *United States*,
348 U.S. 540 (1955) 21

Stoll v. *Gottlieb*, 305 U.S. 165 (1938) 16

United States v. *Dixie Carriers*,
627 F.2d 736 (5th Cir. 1980) 23

United States v. *Locke*, 529 U.S. 89 (2000) 26

Universal Coop., Inc. v. *FCX, Inc. (In re FCX, Inc.)*,
853 F.2d 1149 (4th Cir. 1988) 14-18

Vanston Bondholders Prot. Comm. v. *Green*,
329 U.S. 156 (1946) 29

Wade v. *Bradford*, 39 F.3d 1126 (10th Cir. 1994) 18

Wisniewski v. *United States*,
353 U.S. 901 (1957) (per curiam) 18

State Constitutional Provision

CAL. CONST. art. XII 1

Federal Statutes

11 U.S.C. § 362(b)(4) 28

11 U.S.C. § 363(b)(2) 29

11 U.S.C. § 525 28

11 U.S.C. § 1123(a) ..... *passim*

11 U.S.C. § 1124(2) 28
11 U.S.C. § 1126 16
11 U.S.C. § 1129(a)(3) 16, 28
11 U.S.C. § 1129(b)(2)(A)(iii) 15
11 U.S.C. § 1141 ..... 15-17, 22
11 U.S.C. § 1142(a) 9, 22, 24
11 U.S.C. § 1145 28
11 U.S.C. § 1146 28
15 U.S.C. § 79i(a)(2) 6
15 U.S.C. § 79j(b) 6
16 U.S.C. § 801 6
16 U.S.C. § 824(b)(1) 26
16 U.S.C. § 824b 6
28 U.S.C. § 959(b) 28, 29
28 U.S.C. § 1452(a) 28
42 U.S.C. §§ 2233-34 6
Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 1123, 92 Stat. 2549 16

State Statutes

Act of Sept. 24, 1996, ch. 854, 1996 Cal. Stat. 3678 2
Act of Jan. 18, 2001, ch. 2, 2001-2002 Cal. Stat. 4 3
CAL. PUB. RES. CODE § 21065 (West 1996) 4
CAL. PUB. RES. CODE § 21100 (West 1996) 4

CAL. PUB. RES. CODE § 21151 (West 1996) 4

CAL. PUB. UTIL. CODE § 377 (West 2004) 4, 19

CAL. PUB. UTIL. CODE § 451 (West 2004) 5

CAL. PUB. UTIL. CODE § 701 (West 2004) 1, 4

CAL. PUB. UTIL. CODE § 701.5 (West 2004) 4

CAL. PUB. UTIL. CODE § 728 (West 2004) 5

CAL. PUB. UTIL. CODE § 761 (West 2004) 5

CAL. PUB. UTIL. CODE §§ 816-30 (West 2004) 4

CAL. PUB. UTIL. CODE § 851 (West 2004) 4

CAL. PUB. UTIL. CODE § 852 (West 2004) 4

CAL. PUB. UTIL. CODE § 854 (West 2004) 4

Treatise

COLLIER ON BANKRUPTCY (15th ed. rev. 2004) 17, 18

Other Authorities

10 C.F.R. § 50.80 6

130 CONG. REC. H1110 (daily ed. Mar. 20, 1984) (statement of Rep. Kastenmeier) 16

Hon. Richard D. Cudahy, *Deregulation of Energy: Lessons from the West*, 54 ADMIN. L. REV. 333 (2002) 2, 3, 26

2001-2002 CAL. ASSEMBLY J. 110-13 (State of the State address by Gov. Gray Davis) 2

H.R. REP. NO. 96-1195 (1980) 7

RESPONDENTS' BRIEF IN OPPOSITION

In the interlocutory decision below, the Ninth Circuit rejected petitioners' theory that through an inconspicuous "notwithstanding" clause enacted in 1984 as a technical amendment to the Bankruptcy Code, Congress imposed mandatory, automatic, and self-executing preemption of all nonbankruptcy federal, state, and local regulatory laws applicable to the implementation of a confirmed chapter 11 plan. After the Ninth Circuit issued its decision, the bankruptcy case underlying the decision was settled. That settlement has resulted in a confirmed reorganization plan for petitioner PG&E that does not raise the question allegedly presented by the petition and that does not preempt regulatory laws. Although two appeals from the order confirming the settlement plan remain pending, PG&E has completed implementation of that plan.

Certiorari should be denied because the dispute decided by the Ninth Circuit is likely to become indisputably moot during the pendency of any review by this Court, and may well be moot now. In any event, the Ninth Circuit's decision does not conflict with any decision of this Court or any other court of appeals, and petitioners identify no other plausible reason for certiorari.

STATEMENT OF THE CASE

1. Petitioner PG&E is a public utility that owns and operates facilities within the State of California used for the generation, transmission, and retail distribution of electricity and natural gas. Pet. App. 2. Respondent California Public Utilities Commission (the "Commission") is an agency of the State of California, established by the California constitution, with broad regulatory authority over California public utilities, including PG&E. *See* CAL. CONST. art. XII; CAL. PUB. UTIL.

CODE § 701 (West 2004). The other twenty-one respondent agencies of the State of California administer some, but not all, of the state laws protecting public safety, health, and welfare that PG&E sought to preempt.

Traditionally, rates charged by PG&E were based on PG&E's cost of service. That rate methodology generally allows recoupment of reasonable costs and an opportunity to earn a reasonable return on the utility's rate base.[1] In 1996, however, the California legislature enacted a program of limited deregulation of California electric utilities. As part of that program, retail rates were temporarily frozen at levels that were expected to enable existing utilities to recover certain "stranded costs"—i.e., transition costs related to certain past uneconomic investments and contracts.[2]

Beginning in the summer of 2000, when the rate freeze was still in effect, prices for wholesale electricity rose dramatically and dangerous power disruptions occurred in California. As part of California's deregulatory program, electric utilities had been given incentives to sell generating facilities.[3] Sales of such facilities to out-of-state merchant generating companies, the California executive and legislature concluded, had resulted in "price-gouging" by those companies, which in turn had led to "an unreliable supply of energy" and the danger of power outages. *See* 2001-2002 CAL. ASSEMBLY

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[1] *See In re PG&E*, Dec. 03-02-035, 2003 WL 548951, at *3 (Cal. Pub. Util. Comm'n Feb. 13, 2003).

[2] *See* Act of Sept. 24, 1996, ch. 854, § 10, 1996 Cal. Stat. 3678, 3698-3700 (codified in part as amended at CAL. PUB. UTIL. CODE §§ 367, 368(a) (West 2004)); *see also* Hon. Richard D. Cudahy, *Deregulation of Energy: Lessons from the West*, 54 ADMIN. L. REV. 333, 341 (2002).

[3] *See* Cudahy, *supra* note 2, at 341-42 & n.32.

J. 110-13 (State of the State address by Gov. Gray Davis). The California legislature accordingly amended section 377 of the California Public Utilities Code. *See* Act of Jan. 18, 2001, ch. 2, § 3, 2001-2002 Cal. Stat. 4, 7-8 (codified at CAL. PUB. UTIL. CODE § 377 (West 2004)). As amended, that section prohibits any owner of electric generation facilities in California from disposing of those facilities before 2006. The executive and legislative branches of the California state government took numerous other actions to meet the energy crisis.[4]

2. PG&E filed a chapter 11 petition on April 6, 2001. On December 19, 2001, PG&E submitted a proposed reorganization plan that called for PG&E's disaggregation into four new companies (the "Proposed Preemption Plan"). Those four new companies (the "Proposed Successor Companies") would have owned and operated, respectively, PG&E's generation, electric transmission, gas transmission, and retail distribution businesses. *See* Pet. App. 4a, 71a-72a. PG&E, as a unitary vertically integrated utility, would have ceased to exist.

Prior to PG&E's bankruptcy, the Commission was the principal regulator for PG&E's generation, intrastate gas transmission, and retail distribution businesses. After implementation of the Proposed Preemption Plan, the Commission—according to PG&E—would have had regulatory jurisdiction over only one of the four Proposed Successor Companies (the company that engaged in retail distribution).

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[4] *See* Cudahy, *supra* note 2, at 344-48. In support of their accusation of regulatory misfeasance against the Commission, petitioners cite only their own judicially untested allegations in their proposed disclosure statement. Pet. 3 (citing C.A. Supplemental Excerpts of Record 76-77, 96). Who was responsible for PG&E's bankruptcy was not the subject of findings in the courts below and is not relevant to the petition.

See Pet. App. 4a. On PG&E's view, the other three Proposed Successor Companies would have been subject to the regulatory jurisdiction of the Federal Energy Regulatory Commission. *See id.* The result of the proposed plan—and, in respondents' view, a major purpose of the plan—would thus have been the permanent elimination of the Commission's regulatory jurisdiction over most of PG&E's businesses and operations.

Upon confirmation, PG&E's Proposed Preemption Plan purported to impose mandatory, automatic, and self-executing express preemption, pursuant to section 1123(a) of the Bankruptcy Code, of *all* state or local laws applicable to the plan, the transactions proposed in the plan, or the implementation of the plan, whether those state or local laws were identified in the plan or not. *See* Pet. App. 6a, 67a-68a. The California and local laws purportedly preempted by the Proposed Preemption Plan, had it been confirmed, would have included, among others,

- section 377 of the California Public Utilities Code, which prohibits the transfers proposed in the plan of PG&E's generation facilities, *see* Pet. App. 69a-70a;
- California regulatory laws requiring the Commission's prior approval for any proposed plan transactions, including transfers of PG&E's property and securities issuances, *see* CAL. PUB. UTIL. CODE §§ 701.5, 816-30, 851, 852, 854 (West 2004); Pet. App. 70a; C.A. E.R. 38-39;
- California laws requiring review of the potential environmental consequences of PG&E's disaggregation, *see* CAL. PUB. RES. CODE §§ 21065, 21100, 21151 (West 1996); CAL. PUB. UTIL. CODE § 851 (West 2004);

- any laws conferring discretion on any state or local agency to deny the assignments purportedly required by the plan of PG&E permits or licenses, *see* Pet. App. 68a-69a; and
- under certain circumstances, PG&E's fundamental duty under California law to supply all of its customers with electricity and natural gas, *see* Pet. App. 103a; C.A. E.R. 33-34.[5]

The "notwithstanding" clause of section 1123(a) refers to "nonbankruptcy law," which includes *federal* nonbankruptcy law. *Patterson* v. *Shumate*, 504 U.S. 753, 759 (1992). The logic of PG&E's position thus requires that federal nonbankruptcy laws applicable to chapter 11 plans be displaced to the same extent and in the same way as state and local laws.

As the United States stated in its *amicus* brief to the Ninth Circuit,

> PG&E's [Proposed Preemption Plan] did not categorically assert that federal laws governing the transfer of an asset, license or permit are . . . preempted. But its statements concerning the reorganization's impact are decidedly equivocal and plainly calculated to reserve the right to preempt those laws as well if the necessary federal approvals are not forthcoming.

Brief for United States as Amicus Curiae in Support of Vacatur and Remand, filed Nov. 14, 2002 ("U.S. Br.") at 9 (citing C.A. E.R. 41-42).

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[5] *See* CAL. PUB. UTIL. CODE §§ 451, 728, 761 (West 2004); *In re S. Cal. Edison Co.*, Dec. 01-01-046, 206 P.U.R. 4th 141, 142, 145-47, 2001 Cal. PUC LEXIS 113, at *1-2, *9-16 (Cal. Pub. Util. Comm'n 2001).

PG&E's Proposed Preemption Plan called for a change in ownership of PG&E's nuclear generating facility at Diablo Canyon, which required approval from the Nuclear Regulatory Commission. C.A. E.R. 26-27; *see* 42 U.S.C. §§ 2233-34; 10 C.F.R. § 50.80. The proposed plan called for a change in control over ownership interests in a public utility, which required approval by the Securities and Exchange Commission under the Public Utility Holding Company Act. C.A. E.R. 27; *see* 15 U.S.C. § 79i(a)(2), 79j(b). The proposed plan called for many transactions, such as the transfer of licenses to operate hydroelectric facilities, requiring approval by the Federal Energy Regulatory Commission. C.A. E.R. 18-19, 23, 26, 31; *see* 16 U.S.C. §§ 801, 824b.

3. Numerous parties objected to PG&E's Proposed Preemption Plan on the ground that the proposed plan unlawfully sought express preemption of regulatory laws applicable to plan implementation. Those objectors included the Commission; various other agencies of the State of California charged with administering California regulatory laws that might have been subject to purported preemption under the Proposed Preemption Plan; the remaining respondents here; and the United States. Pet. App. 64a.

The bankruptcy court disapproved PG&E's Proposed Preemption Plan to the extent it relied on express preemption under the "notwithstanding" clause of section 1123(a). The bankruptcy court observed that section 1123(a)(5) "can be read simply as a directive to the plan proponent about what must go into the plan." Pet. App. 80a. On this view, the "notwithstanding" clause would displace nonbankruptcy law (and any private rights enforceable under nonbankruptcy law) that were "otherwise applicable" to the *contents* of a plan, which is the subject addressed by the passage immediately following the "notwithstanding" clause in section 1123(a)(5).

The bankruptcy court noted that legislative history described the "notwithstanding" clause as a "stylistic" addition with the following purpose: "This amendment makes it clear that the rules governing what is contained in the reorganization plan are those specified in this section . . . ." Pet. App. 87a (quoting H.R. REP. NO. 96-1195, at 22, 122-23 (1980)).

In the bankruptcy court's view, PG&E's interpretation would lead to absurd results that Congress could not have intended, such as authorizing a debtor, acting pursuant to a plan, to "dump toxic wastes (notwithstanding environmental laws and Supreme Court precedent)." Pet. App. 81a (referring to *Midlantic Nat'l Bank* v. *N.J. Dep't of Envtl. Prot.*, 474 U.S. 494 (1986)). The bankruptcy court

> reject[ed] the notion that Congress, without a hint in the legislative history, in a section of the Bankruptcy Code titled "Contents Of Plan," and using words calling for "adequate means for the Plan's implementation," intended to permit a debtor's plan—confirmed by a bankruptcy judge (not by a legislative act, as in most preemption situations)—to obliterate a whole area of jurisdiction and authority traditionally left to state law.

Pet. App. 84a-85a (footnote omitted).

4. On appeal, the district court reversed. The district court held that "[n]onbankruptcy laws otherwise applicable to the 'restructuring transactions necessary to an effective and feasible reorganization' are expressly preempted by the bankruptcy code." Pet. App. 62a (citation omitted).

The district court recognized that its interpretation of section 1123(a) potentially authorized the displacement of federal law, as well as state and local law. The district court suggested, for example, that it might not be "undesirable" for a

debtor to be able to consummate a merger pursuant to a reorganization plan, even if the merger would otherwise be forbidden by "§ 7 of the Clayton Act or some analogous state law." Pet. App. 49a-50a.

5. Respondents appealed to the Ninth Circuit, where the United States filed an *amicus* brief opposing PG&E's position. As the United States explained,

> the [district court's] holding suggests that the bankruptcy court would have statutory authority, at the later stages of this very case, to override the permitting, licensing, or regulatory decisions of environmental agencies, the Federal Energy Regulatory Commission, the Securities and Exchange Commission, or the Nuclear Regulatory Commission if any of these governmental decisions interfere with implementation of the debtor's plan of reorganization.

U.S. Br. at 18-19; *see also* Pet. App. 7a. "Section 1123(a)(5) of the Bankruptcy Code does not authorize this wholesale displacement of other federal and state law." U.S. Br. at 19. The United States concluded that "[t]he district court . . . erred in construing section 1123(a)(5) to expressly preempt nonbankruptcy law." *Id.* at 20. In the view of the United States, the bankruptcy court had correctly interpreted the "notwithstanding" clause to expressly preempt state laws "that might purport to dictate the contents of a reorganization plan or the conditions under which the debtor may submit a reorganization plan for further consideration." *Id.* at 27.

A unanimous panel of the Ninth Circuit reversed the decision of the district court. The Ninth Circuit rejected petitioners' view of the "notwithstanding" clause as expressly preempting all nonbankruptcy laws applicable to the implementation of a chapter 11 plan. *See* Pet. App. 1a-29a. The Ninth Circuit found that

> the addition of the "notwithstanding" clause to § 1123(a) was merely a clarification and confirmation of the preemptive effect of a reorganization plan that already existed under the 1978 Bankruptcy Code. That preemptive effect, expressly stated in the "notwithstanding" clause of § 1142(a), was limited to otherwise applicable nonbankruptcy laws "relating to financial condition."

Pet. App. 3a. The Ninth Circuit's decision was guided by the traditional tools of statutory construction, as well as the general presumption requiring a narrow construction of federal statutory provisions preempting state law, and the further presumption against construing the Bankruptcy Code to preempt state regulatory law.

6. Following the bankruptcy court's interlocutory decision below, PG&E proposed an amended reorganization plan that continued to seek PG&E's disaggregation, but that purported to rely on implied preemption to oust state and local law.[6] During the pendency of the appeals described above in the district court and the Ninth Circuit, litigation ensued in the bankruptcy court concerning PG&E's amended proposed plan and a competing proposed plan submitted by the Commission that did not call for disaggregation.

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[6] [Proposed] Plan of Reorganization for PG&E dated Apr. 19, 2002, Docket Entry No. 6053, *In re PG&E*, No. 01-30923 DM (Bankr. N.D. Cal.); *see In re PG&E*, 304 B.R. 395, 399 (Bankr. N.D. Cal. 2004), *appeal dismissed sub nom. Lynch* v. *Cal. Pub. Util. Comm'n*, 311 B.R. 798 (N.D. Cal. 2004), *appeal docketed*, No. 04-16493 (9th Cir. July 29, 2004), *and appeal docketed sub nom. City of Palo Alto* v. *PG&E*, No. 3:04-cv-00727-VRW (N.D. Cal. Feb. 23, 2004).

On June 19, 2003, PG&E and the Commission's staff announced a proposed settlement that provided for a new proposed reorganization plan for PG&E (the "Settlement Plan"). The Settlement Plan did not call for disaggregation of PG&E or preemption of any laws based on section 1123(a). On December 18, 2003, the Commission, by a vote of three commissioners in favor and two opposed, approved the settlement agreement that provided the basis for the Settlement Plan.[7] The bankruptcy court issued an order confirming that plan on December 22, 2003 (the "Confirmation Order"). *See In re PG&E*, 304 B.R. at 419. Pursuant to the confirmed Settlement Plan, PG&E entered into approximately $2.9 billion in new and widely syndicated credit facilities, closed the public offering of approximately $6.7 billion in bonds, and made payments to creditors in the aggregate amount of over $8 billion.[8] The Settlement Plan subsequently became effective on April 12, 2004.[9] As of the effective date, PG&E emerged from bankruptcy. It is now operating normally, as a single vertically integrated public utility, outside of bankruptcy.

7. The two Commissioners of the Commission who had voted against the Settlement Plan (the "Dissenting

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[7] *In re PG&E*, Dec. 03-12-035, 230 P.U.R. 4th 101, 142-43, 2003 WL 23104229 (Cal. Pub. Util. Comm'n 2003), *petitions for writ of review filed sub nom. Aglet Consumer Alliance* v. *Pub. Util. Comm'n*, No. A106157 (Cal. Ct. App. filed Apr. 15, 2004), *and City & County of San Francisco* v. *Pub. Util. Comm'n*, No. A106158 (Cal. Ct. App. filed Apr. 15, 2004).

[8] *See* PG&E and PG&E Corp., Form 8-K (filed Apr. 12, 2004); PG&E and PG&E Corp., Form 8-K (filed Mar. 9, 2004).

[9] *See* Notice of Occurrence of Effective Date dated July 31, 2003, Docket Entry No. 15110, *In re PG&E*, No. 01-30923 DM (Bankr. N.D. Cal.).

Commissioners") appealed from the Confirmation Order to the district court. The district court dismissed the appeal for lack of appellate standing, and the Dissenting Commissioners brought an appeal, which remains pending, from that ruling to the Ninth Circuit. *Lynch* v. *Cal. Pub. Util. Comm'n*, 311 B.R. 798, 810 (N.D. Cal. 2004), *appeal docketed*, No. 04-16493 (9th Cir. July 29, 2004). The City of Palo Alto also filed a notice of appeal from the Confirmation Order to the district court. *City of Palo Alto* v. *PG&E*, No. 3:04-cv-00727-VRW (N.D. Cal. notice of appeal docketed Feb. 23, 2004). So far as the district court's docket sheet reveals, Palo Alto has taken no further steps to prosecute its appeal.

REASONS FOR DENYING THE PETITION

I.

THIS CASE IS NOT A SUITABLE VEHICLE FOR RESOLUTION OF THE QUESTION PRESENTED

A. The Dispute Allegedly Underlying the Petition Is Likely to Become Indisputably Moot During the Pendency of This Court's Review

Petitioners ask this Court to adjudicate a controversy concerning PG&E's Proposed Preemption Plan, which has been effectively superseded by the confirmed and implemented Settlement Plan. The petition thus does not present a real and substantial controversy. Petitioners contend that the petition is not moot because two federal appeals from the Confirmation Order are pending. *See* Pet. 8 n.2. Petitioners' theory is that *if* one of those appeals is successful; and *if* the Confirmation Order is overturned on appeal as a result; and *if* PG&E can somehow unscramble the eggs by reversing implementation of the Settlement Plan; and *if* PG&E then reverts to a preemption-

based plan, the currently moribund issue as to which petitioners seek certiorari might conceivably be revived.

Petitioners have also said that none of this is likely to happen. "Petitioners fully expect that both appeals [from the Confirmation Order] will be resolved in their favor and that the confirmation order will be affirmed." Pet. 8 n.2. The district court has ruled that appellants in one appeal lack standing; a further appeal is pending before the Ninth Circuit. *See supra* p. 11. The Dissenting Commissioners' terms of office expire at the end of 2004, and if they are not reappointed their appeal will be moot at that time. The second appeal, brought by Palo Alto, has been inactive since February 2004. It is not even clear to respondents that Palo Alto actually intends to prosecute the appeal. The Commission, which is an appellee in that proceeding, will consider moving to dismiss that appeal as moot if PG&E does not do so and if Palo Alto does not abandon the appeal.

Petitioners have further informed this Court that "petitioners believe that both appeals [from the Confirmation Order] will be determined to be moot if not otherwise resolved or disposed of on other grounds."[10] Petitioners are referring to a bankruptcy doctrine under which an appeal from a confirmation order is "equitably moot" if (as here) the confirmation order was not stayed,[11] and if the appellate court would be "unable to afford effective relief" because of events subsequent to confirmation, such as substantial implementation of the

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[10] Petitioners' Application to Extend Time to File Petition for a Writ of Certiorari, docketed May 14, 2003, at 5.

[11] The bankruptcy court and the district court denied a stay of the Confirmation Order. *Lynch* v. *Cal. Pub. Util. Comm'n*, No. C-04-0580 VRW, 2004 WL 793530, at *4 (N.D. Cal. Apr. 9, 2004). No further stay application was made.

confirmed plan. *See S.S. Retail Stores Corp.* v. *Ekstrom (In re S.S. Retail Stores Corp.)*, 216 F.3d 882, 884-85 (9th Cir. 2000). Petitioners thus quite plausibly contend that implementation of the Settlement Plan (which included several multi-billion dollar transactions, *see supra* p.10) could not now be reversed, more than five months after the effective date; and that consequently reversal of the Confirmation Order could not occur. If petitioners are correct, then the past dispute between petitioners and respondents over the Proposed Preemption Plan cannot be revived.

The petition will be indisputably moot if PG&E prevails on both appeals from the Confirmation Order. *See* Pet. 8 n.2. That could readily occur during this Court's review of the Ninth Circuit's decision below. This Court should not waste its resources by commencing review of a case that it would probably be unable to decide on the merits, and that at most is currently of merely contingent significance to the parties.

There is yet another way that this case could readily become indisputably moot during the pendency of this Court's review. Under PG&E's settlement agreement with the Commission, PG&E "shall withdraw" the Proposed Preemption Plan following the later of the effective date for the Settlement Plan, which has already occurred, and "the date on which the Commission approval of this Agreement is no longer subject to appeal . . . ." *In re PG&E*, 230 P.U.R. 4th at 160, 2003 WL 23104229, at App. C, ¶ 9. The quoted phrase refers to review in the California state courts of the Commission's decision, which is ongoing and could conclude during the pendency of this Court's review. *See supra* note 7. Once that review in the California courts is final, PG&E will be required to formally withdraw the Proposed Preemption Plan, and the controversy presented by the Petition will therefore be moot, even if federal appeals from the Confirmation Order remain pending.

B. Certiorari Should Be Denied Because of the Substantial Argument That the Case Is Already Moot

The passage of time and PG&E's implementation of the Settlement Plan have completely transformed PG&E's financial condition since December 2001, when it submitted the Proposed Preemption Plan. Consequently, even if PG&E were to attempt in the future to frame a preemption-based plan, that plan could not be the Proposed Preemption Plan, as described in the proposed disclosure statement that the bankruptcy court disapproved. Practically speaking, such a future plan would necessarily be a new plan, accompanied by a new disclosure statement, that would attempt to restructure PG&E's obligations to its new creditors under its new credit facilities and new publicly held bonds, and that would thus describe radically changed facts and present potentially new legal disputes. (In addition, petitioners do not represent that "in the unlikely event that either challenge to the confirmed plan should succeed" (Pet. 8 n.2), PG&E would attempt to proceed based on a proposed plan invoking express preemption under section 1123(a).) The dispute described in the petition therefore appears to be moot, and any hypothetical future controversy over the supposed possibility of a new preemption-based plan is not ripe. *See Renne* v. *Geary*, 501 U.S. 312 (1991); *SEC* v. *Medical Comm. for Human Rights*, 404 U.S. 403 (1972).

II.

THE NINTH CIRCUIT'S HOLDING DOES NOT CONFLICT WITH ANY HOLDING OF ANY COURT OF APPEALS

The decision below does not conflict with *Universal Cooperatives, Inc.* v. *FCX, Inc. (In re FCX, Inc.)*, 853 F.2d 1149 (4th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989). In *FCX*, a debtor owed a money debt to a creditor that was secured

by non-cash collateral. Under the confirmed plan approved by the Fourth Circuit's ruling, the secured creditor was required to accept the collateral in satisfaction of the debt, where (i) the value of the collateral was equal to the amount of the debt, but where (ii) the secured creditor had a *contractual* right, which the Fourth Circuit held unenforceable on the facts, to refuse to accept the collateral and to demand payment in cash.[12] *FCX* thus simply allowed nonenforcement of a secured creditor's contractual right, where the secured creditor received full value for its claim. *FCX* did *not* permit a debtor to preempt regulatory law.

Section 1123(a)(5)(D) of the Bankruptcy Code allows a plan to include a provision for the "distribution of property of the estate among those having an interest in such property." Under section 1129(b)(2)(A)(iii) of the Code, a plan may be "crammed down" over the objections of a secured creditor if, among other requirements, the secured creditor receives the "indubitable value of [its] claims." The Fourth Circuit held that the collateral the *FCX* debtor proposed to convey to the secured creditor was "property of the estate" in which the secured creditor had an interest for purposes of section 1123(a)(5)(D), and that the conveyance of collateral gave the secured creditor "indubitable value" for purposes of section 1129(b)(2)(A)(iii). 835 F.2d at 1153, 1157-59.

Under section 1141 and related provisions in the Code, a confirmed chapter 11 plan may render certain pre-bankruptcy contractual or economic rights of a creditor against a debtor

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[12] More specifically, the secured creditor claimed that its by-laws entitled it to refuse to accept the collateral. The Fourth Circuit "generally agree[d]" that the by-laws constituted a contract between the secured creditor and the debtor. 835 F.2d at 1154 n.5.

(like the pre-bankruptcy right of the secured creditor in *FCX* to refuse to accept collateral) unenforceable. That power, however, does not derive from the "notwithstanding" clause, which was added to section 1123(a) in 1984 as a technical amendment. Pet. App. 13a. Section 1123(a), as originally enacted in the Bankruptcy Code of 1978, contained no such clause, *see* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 1123, 92 Stat. 2549, 2631-33, and neither did the predecessor provisions in the Bankruptcy Act, *see* Pet. App. 9a-13a. Reorganization plans were able to modify the economic rights of creditors against a debtor before 1984.

The lower federal courts have analogized a confirmed chapter 11 plan to a consent decree or a contract.[13] A plan is adopted through creditor voting by classes or cramdown pursuant to sections 1126 and 1129, and after confirmation is binding under section 1141(a) on "the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor."[14] Section 1141 also specifies the nature

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[13] *See, e.g.*, *First Nat'l Bank* v. *Allen*, 118 F.3d 1289, 1294 (8th Cir. 1997) ("[A] confirmed plan of reorganization acts like a contract that is binding on all parties, debtor and creditors alike."); *Hillis Motors, Inc.* v. *Haw. Auto. Dealers' Ass'n*, 997 F.2d 581, 588 (9th Cir. 1993) ("A reorganization plan resembles a consent decree and therefore, should be construed basically as a contract.").

[14] *See NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 530 n.10 (1984) ("[A] plan of reorganization is binding upon all creditors once the plan is confirmed . . . .") (citing 11 U.S.C. § 1141(d)(1)(A)(i)); *see also Stoll* v. *Gottlieb*, 305 U.S. 165, 169 (1938); *In re Equitable Office Bldg. Corp.*, 72 S. Ct. 1086, 1088 (1946) (Reed, J., in chambers); Pet. 13 ("'[T]he very purpose of bankruptcy is to modify the rights of *debtors and*

of the debts from which the debtor is discharged as a result of confirmation. Section 1141 does not describe federal, state, or local governments as bound by the plan, and it does not refer to the discharge of a debtor's obligations under regulatory law.

The result in *FCX*, which approved modification of a creditor's contractual rights, is thus compatible with traditional bankruptcy principles. At most, language in which the *FCX* court described one of its reasons for that result—*i.e.*, its inappropriate reliance on the "notwithstanding" clause of section 1123(a)—can be read, out of context, to be in tension with the Ninth Circuit's decision. *FCX* provides no reason to believe, however, that the *FCX* court would have extended its interpretation of the "notwithstanding" clause from nonenforcement of contractual rights to the utterly different context of preemption of regulatory law. The *Collier* treatise, far from supporting petitioners, underscores this distinction.[15]

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creditors . . . .'") (quoting 130 CONG. REC. H1110 (daily ed. Mar. 20, 1984) (statement of Rep. Kastenmeier)) (emphasis added).

[15] Petitioners principally cite passages from *Collier* that pertain to nonenforcement of contract rights. Pet. 11 n.4. *Collier* squarely asserts, however, that a chapter 11 plan may *not* override state regulatory laws unrelated to financial condition:

> If the terms of a plan call for a party to take an act in violation of an applicable law or regulatory requirement not relating to a debtor's financial condition, a court should not issue an order enabling the debtor to avoid such law or regulatory requirement. For example, if the plan called for the transfer of a broadcast license or a license to sell alcoholic beverages, an order implementing confirmation should not allow the debtor to evade the

In other words, there is every reason to believe that the *FCX* court, if faced with the facts of this case, would have reached exactly the same result as the Ninth Circuit.[16]

Petitioners' other conflict claims are insubstantial. *Integrated Solutions, Inc.* v. *Service Support Specialties, Inc.*, 124 F.3d 487, 493 (3d Cir. 1997), merely cited the "notwithstanding" clause of section 1123(a) in passing *dicta* as one of several examples of express preemption in the Bankruptcy Code. The citation says nothing about the scope of express preemption under the clause. *Wade* v. *Bradford*, 39 F.3d 1126 (10th Cir. 1994), indicated that a reorganization plan may modify "a *creditor's* state law *property* rights." *Id.* at 1130 (emphasis added). As *Wade* simply allowed nonenforcement of a creditor's mortgage-based rights, and correctly did not attribute that nonenforcement to the "notwithstanding" clause of section 1123(a), it is irrelevant here.

Alleged conflicts with decisions of district courts or bankruptcy courts do not warrant certiorari. *See, e.g.*, *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, of the four such decisions cited by petitioners, one was wrongly decided and is distinguishable on

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necessary regulatory process for obtaining such a transfer.

8 COLLIER ON BANKRUPTCY ¶ 1142.03[2] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2004).

[16] As the bankruptcy court below commented, "[t]he court in *FCX* was not faced with anything similar to [the] relief sought by [PG&E] in this case, and did not discuss the ramifications of such a reading." Pet. App. 97a.

multiple grounds,[17] and the others do not support petitioners at all.[18] Respondents' position, on the other hand, is supported by

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[17] First, *Pub. Serv. Co. of N.H. v. New Hampshire (In re Pub. Serv. Co. of N.H.)*, 108 B.R. 854 (Bankr. D.N.H. 1989), *vacated as moot by reason of settlement*, No. 90-CV-6 (D.N.H. June 28, 1991) ("*PSNH*"), relied on a blend of implied and express preemption analysis (*see id.* at 887-92; *see also* Pet. App. 90a n.18), while this case is limited to express preemption. Second, *PSNH* allowed preemption only of state laws providing for discretionary review of reorganization transactions by a state agency, *see* 108 B.R. at 860, 887; the opinion denied that the case involved whether plans may "preempt regulatory jurisdiction generally," *id.* at 861. *PSNH* did not involve preemption of statutory prohibitions on such transactions like § 377 of the California Public Utilities Code. Third, *PSNH* characterized (in respondents' view, erroneously) the state laws there identified for preemption as economic. *See id.* at 870, 890; *see also* Pet. App. 91a n.20, 93a.

[18] *See First Union Nat'l Bank* v. *Gibbons (In re Princeton-N.Y. Investors, Inc.)*, 219 B.R. 55, 63 n.8 (D.N.J. 1988) (not involving any dispute concerning the "notwithstanding" clause of § 1123(a), and merely quoting the passage from *Integrated Solutions* discussed above in text); *In re Clarksville Hospitality Corp.*, No. 93-17668-CJK, 1996 Bankr. LEXIS 340 (Bankr. D. Mass. Apr. 4, 1996) (finding state statute respecting interest owed on delinquent tax debts to be inapplicable, but not attributing that result to the "notwithstanding" clause of § 1123(a)); *In re Kizzac Mgmt. Corp.*, 44 B.R. 496 (Bankr. S.D.N.Y 1984) (authorizing modification of creditor's contractual rights in case governed by the Bankruptcy Code *prior* to the 1984 enactment of the "notwithstanding" clause at issue in this case, *see* 44 B.R. at 497 n.1).

lower court decisions.[19] Respondents are aware of no case, and petitioners have cited none, in which a court actually preempted state regulatory law under the "notwithstanding" clause of section 1123(a).

III.

THE NINTH CIRCUIT REACHED THE CORRECT RESULT

A. This Court's Decision in *Holywell Corp.* v. *Smith* Supports Respondents' Position

In *Holywell Corp.* v. *Smith*, 503 U.S. 47 (1992) (discussed at Pet. 12), this Court held that a chapter 11 trustee was required to file a tax return showing income attributable to an asset sale pursuant to a liquidation plan. Tax laws are "nonbankruptcy" laws that are "otherwise applicable" to plan implementation. On petitioners' view, the "notwithstanding" clause of section 1123(a) would therefore displace all such tax laws.

Holywell (which does not refer to the "notwithstanding" clause) described section 1123(a)(5)(B) as authorizing a plan to transfer a debtor's property. *See id.* at 55. That section indicates that such transfers are generically eligible for inclusion in a plan. *Holywell* did not state or imply, however, that a plan may authorize an *illegal* transfer of property, such as (to choose among a multitude of examples) transfers of environmentally hazardous substances in violation of federal or state environmental laws, of a business in violation of federal or

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[19] *E.g.*, *In re Union Golf of Fla., Inc.*, 242 B.R. 51, 59 (Bankr. M.D. Fla. 1998) (plan may not override local zoning laws); *In re Wabash Valley Power Ass'n, Inc.*, No. 85-2238-RWV-11, 1991 WL 11004220, at *73-75 (Bankr. S.D. Ind. Aug. 7, 1991) (plan may not preempt state regulatory laws prohibiting plan transactions).

state antitrust laws, of watershed lands owned by a utility without regulatory approvals, of a nuclear power plant without NRC approval, or of real property in violation of state or local zoning laws. There is a wide difference between reading section 1123(a)(5)(B) to indicate that a trustee may engage in a particular category of lawful transactions pursuant to a confirmed plan, as *Holywell* did, and in reading that section to authorize illegal and even criminal transactions, as petitioners do.

B. The Decision Below Does Not Conflict with Other Holdings by the Courts of Appeals or this Court Interpreting Different "Notwithstanding" Clauses in Different Statutes

According to petitioners, this Court should grant certiorari to disapprove an alleged "line" of Ninth Circuit decisions that supposedly fail to give a literal reading to different "notwithstanding" clauses in widely different statutes. Pet. 14-18. This argument misunderstands the precedents on which the argument purports to rest.

The syntactically complex "notwithstanding" clause of section 1123(a) is hardly self-defining. *Cf. Shomberg* v. *United States*, 348 U.S. 540, 545 (1955). Section 1123(a) begins with the phrase "[n]otwithstanding any otherwise applicable nonbankruptcy law, a plan shall—," which modifies seven immediately following subsections, including subsection 5. Subsection 5 begins with the phrase "provide adequate means for the plan's implementation such as—," followed by a non-exclusive list in subsections (A) through (J) of ten categories of potentially permissible plan provisions.

Section 1123(a), which is titled "Contents Of Plan," commands the plan proponent to set forth, among other things, a statement of "adequate means" as a required element of every plan. Creditors and others scrutinizing the plan are thereby

enabled to assess for themselves whether the "means" specified will in fact be "adequate" to accomplish the purposes of the plan. The non-exclusive list of categories of plan provisions in subsections 1123(a)(5)(A) through (J) indicates that the specified categories are generically appropriate for a plan. Some such categories, such as modification of a lien under section 1123(a)(5)(E), refer to transactions that, if included in a confirmed plan, may override a creditor's contractual or economic rights under section 1141(a) or other Code provisions. *See supra* pp. 15-17. Tellingly, however, the specified categories are all permissible as a general matter under regulatory law.

For section 1123(a)(5), the phrase immediately following the "notwithstanding" clause mandates inclusion of a description of "adequate means" in a chapter 11 plan. Based in part on that text, the bankruptcy court below identified the domain of conflicting laws expressly preempted by the "notwithstanding" clause of section 1123(a) as laws interfering with the statutory prescription that "this section [1123] (and no other law) governs what is to be placed into a plan of reorganization." Pet. App 87a. The Ninth Circuit, adopting a similar approach, held that

> the addition of the "notwithstanding" clause to § 1123(a) made clear that the rules governing what must be in a confirmable plan are contained in § 1123(a) and not in otherwise applicable nonbankruptcy laws. That is, a plan proposed in conformity with § 1123(a) could be confirmed, and a confirmed plan would then have the preemptive effect precisely specified in § 1142(a).

Pet. App. 27a.

The Ninth Circuit's decision did not cite any of the other Ninth Circuit cases that, according to petitioners, supposedly

form part of the same "line." On examination, those cases simply interpret different "notwithstanding" clauses in widely varying statutes using traditional tools. For example, *Oregon Natural Resources Council* v. *Thomas*, 92 F.3d 792, 797 (9th Cir. 1996), rejected "the broadest possible interpretation" of a "notwithstanding" clause so as to avoid rendering nugatory another subsection of the same enactment. Decisions by other courts of appeals have also interpreted various statutory "notwithstanding" clauses by looking to similar evidence.[20]

This case focuses on properly identifying the domain of laws that are preempted by the particular "notwithstanding" clause of section 1123(a)—not on the abstract meaning or force of "notwithstanding" clauses. *Patterson* v. *Shumate*, 504 U.S. 753 (1992), *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979), *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10 (1993), and *Long Island Rail Road* v. *Aberdeen & Rockfish Railroad Co.*, 439 U.S. 1 (1978), involved quite different statutes (or, in *Cisneros*, a quite different contract) and issues, and thus do not significantly illuminate this case.

C. The Decision Below Does Not Conflict with Cases Cited by Petitioners Involving a Canon of Construction That Is Inapplicable Here

According to petitioners, the decision below conflicts with *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 542 (2001), and other cases invoking the canon of construction that when Congress uses particular language in one section of a statute, but omits that language elsewhere, Congress generally intends a difference in meaning. Pet. 18-20. In *Lorillard*, the Court was

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[20] *E.g.*, *Cliff* v. *Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1124-25 (11th Cir. 2004); *Conoco, Inc.* v. *Skinner*, 970 F.2d 1206, 1223-24 (3d Cir. 1992); *United States* v. *Dixie Carriers, Inc.*, 627 F.2d 736, 739 (5th Cir. 1980).

considering the only two subsections of a statutory section that was enacted following intense administrative, legislative, and public attention. *See* 533 U.S. at 541-46; *see also Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 519 (1992). In the decision below, by contrast, the Ninth Circuit interpreted a textually problematic technical amendment to the Bankruptcy Code. *City of Columbus* v. *Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424 (2002), specifically rejected application of the canon on which petitioners rely to support a broad reading of an express preemption provision, because there, as here, the statutory text at issue did "not provide the requisite 'clear and manifest indication that Congress sought to supplant local authority.'" *Id.* at 434 (citation omitted).

Furthermore, petitioners' interpretation of section 1123(a) creates a more severe anomaly involving section 1142(a). Petitioners say the "notwithstanding" clause of section 1123(a) preempts all nonbankruptcy law applicable to plan implementation. If that were so, then the more limited preemption in section 1142(a) of any "nonbankruptcy law, rule, or regulation relating to financial condition" would be superfluous. In the courts below, petitioners were also obliged to embrace a number of non-textual exceptions to their own interpretation of section 1123(a) in an effort to avoid obviously unacceptable consequences of that interpretation. They asserted, for example, that section 1123(a) provides for only discretionary displacement of federal law but mandatory express preemption of state law, despite the plain textual implication of parity, and despite applicable presumptions that make state law more resistant than federal law to displacement. They also argued that the "notwithstanding" clause does not apply to tax laws; and that it does not authorize preemption of a debtor's post-bankruptcy legal obligations (*see* Pet. 3, 6), although it allegedly does authorize supposedly temporary preemption with permanent results, such as the permanent

structural changes to PG&E's organization and regulatory responsibilities sought in the Proposed Preemption Plan.

D. The Ninth Circuit Properly Construed Section 1123(a) in Light of Applicable Presumptions Against Preemption

In *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996), this Court held that a "presumption against the pre-emption of state police power regulations" is properly applied "to support a narrow interpretation" of an express preemption statute. *Id.* at 485 (citing *Cipollone*, 505 U.S. at 518, 523); *see also Ours Garage*, 536 U.S. at 432-40. The decision below properly applied this presumption. Pet. App. 19a.

New York v. *FERC*, 535 U.S. 1 (2002), on which petitioners rely, is inapposite. There, the Court did not apply the presumption to a federal statute that "unambiguously" expanded the substantive jurisdiction of the Federal Energy Regulatory Commission, *but that did not by its terms preempt any state legislation*. *Id.* at 17-20. This case, which required the Ninth Circuit to determine the "domain" of preempted state statutes under an express preemption provision, is a paradigmatic example for application of the presumption. *See Medtronic*, 518 U.S. at 484; *Cipollone*, 505 U.S. at 517. In *Engine Manufacturers Ass'n* v. *South Carolina Air Quality Management District*, 124 S. Ct. 1756 (2004), the Court observed that application of the presumption "demonstrably makes no difference to resolution" of the questions presented. *Id.* at 1763. The Court did not disturb the rule of *Medtronic* and *Cipollone*.

BFP v. *Resolution Trust Corp.*, 511 U.S. 531 (1994), *Midlantic National Bank* v. *New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986), and *Palmer* v. *Massachusetts*, 308 U.S. 79 (1939), squarely support application of a robust further presumption against preemption

of regulatory law by the Bankruptcy Code. The regulation of public utilities and the environment are areas of traditional state concern. *See PG&E* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 206 (1983); *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 442 (1960). Furthermore, federal energy legislation preserves to the states the authority to determine whether a vertically integrated single-state utility should disaggregate.[21] Petitioners therefore seek to exploit the Bankruptcy Code to alter the Congressionally mandated balance of federal and state authority in this area. And in any event, petitioners seek an interpretation of section 1123(a) that would indiscriminately oust *all* nonbankruptcy law, in *all* areas, for *all* debtors. As whether the presumption applies must be judged against the full range of state and local laws that petitioners' interpretation would preempt, that interpretation calls for the strongest possible presumptions.

Because the purpose of the presumptions is to protect state authority, particularly in areas of traditional state concern, their applicability is judged by looking to the subject matter of the allegedly preempted state statute, not, as petitioners suggest, the allegedly preemptive federal statute. *E.g.*, *United States* v. *Locke*, 529 U.S. 89, 108 (2000) (describing *Medtronic* as "involving medical negligence, a subject historically regulated by the States," and thus looking to subject matter of allegedly preempted state law). In *Locke*, the subject matter of the *state* statute was interstate maritime commerce, which is why no presumption against preemption applied. *See id.* at 99, 108-09.

On an extraordinarily slight alleged statutory warrant, petitioners' interpretation of section 1123(a) would confer on plan proponents an unprecedented ability to displace all

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[21] *See* 16 U.S.C. § 824(b)(1); Cudahy, *supra* note 2, at 349-50 & n.69.

nonbankruptcy federal,[22] state, and local regulatory law. It would be no answer to suggest that bankruptcy courts have some amorphous general discretion to reject particularly exorbitant attempts at preemption. First, on petitioners' theory, the bankruptcy court, like the affected governmental authorities, would not necessarily even know of all the preempted laws. Second, the "notwithstanding" clause by its terms does not empower bankruptcy courts to carve out *ad hoc* exceptions. Thus, petitioners argued below that the "notwithstanding" clause calls for automatic and self-executing displacement of "any" nonbankruptcy law that would otherwise regulate implementation of a plan, whatever views a bankruptcy court might have about the wisdom of preempting particular laws on particular facts. (In contrast, under the doctrine of implied preemption, which is not at issue here, courts may make nuanced judgments concerning whether a particular state law impermissibly "'interfere[s] with the bankruptcy adjudication.'" Pet. App. 28a (quoting *Midlantic*, 474 U.S. at 507).) The utter improbability that Congress would confer so "revolutionary," Pet. App. 87a, and unconfined a power on plan proponents, through so unlikely and inappropriate a vehicle, must count heavily against petitioners' theory. Third, it is highly implausible to think that Congress, through a technical amendment, empowered every bankruptcy judge in the country to make standardless determinations as to which regulatory laws

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[22] Petitioners argued below that section 1123(a) confers only a limited power to displace federal nonbankruptcy law, because that section should be harmonized with other federal laws. But harmonization applies only when neither of the allegedly conflicting federal statutes reflects a "clear intention" as to which should prevail, *Morton* v. *Mancari*, 417 U.S. 535, 550-51 (1974), and on petitioners' view the "notwithstanding" clause would necessarily reflect such an intention.

are sufficiently important to be enforced in bankruptcy proceedings.

Other, narrower preemptive provisions of the Bankruptcy Code would be superfluous if section 1123(a) had the reach that petitioners claim. Section 1124(2) permits a debtor to cure certain defaults "notwithstanding any contractual provision or *applicable law* that entitles the holder of [a claim or interest] to demand accelerated payment of such claim or interest after the occurrence of a default." (Emphasis added.) Section 1145(a)(1) exempts certain "offer[s] or sale[s] under a plan of a security of the debtor" from securities laws, including certain "State or local law[s]," and section 1145(d) exempts certain "notes issued under a plan" from the Trust Indenture Act. Section 1146(c) exempts certain transactions "under a plan" from any stamp or similar tax—taxes that are typically imposed under state law. The limited prohibition in section 525 on a regulator's ability to cancel certain licenses, which this Court considered in *FCC* v. *NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003), would be superfluous if a debtor could override nonbankruptcy licensing restrictions (as PG&E tried to do here) by providing for mandatory license transfers, notwithstanding contrary regulatory law, in a chapter 11 plan.

Congress, mindful of the need for parity under regulatory law between debtors and nondebtors within a state, has structured the Bankruptcy Code and related statutes to preserve state regulatory authority. *See* 11 U.S.C. § 362(b)(4) (automatic stay inapplicable to exercise of police or regulatory powers); *id.* § 1129(a)(3) (plan may not be proposed "by any means forbidden by law"); 28 U.S.C. § 959(b) (bankruptcy trustee and debtor in possession "shall manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in which such property is situated"); *id.*

§ 1452(a) (no removal to federal court of any bankruptcy-related "civil action by a government unit to enforce such governmental unit's police or regulatory power"); *see also* 11 U.S.C. § 363(b)(2)(B) (shortening waiting period under Hart-Scott-Rodino Act for certain sales of property in bankruptcy, and thereby demonstrating Congress's background assumption that antitrust laws apply to bankruptcy proceedings); *Butner* v. *United States*, 440 U.S. 48, 54-55 & n.9 (1979); *Vanston Bondholders Protective Comm.* v. *Green*, 329 U.S. 156, 172-73 (1946) (Frankfurter, J., concurring) ("The Constitution did not intend that transactions that have different legal consequences because they took place in different States shall come out with the same result because they passed through a bankruptcy court.").

Finally, petitioners' theory would create enormous tension between a debtor's duty to obey state law before confirmation of a plan, *see* 28 U.S.C. § 959(b), and the debtor's supposed freedom to ignore nonbankruptcy regulatory law applicable to implementation of a confirmed plan. Before confirmation, for example, a debtor "may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards." *Midlantic*, 474 U.S. at 507. On petitioners' theory, section 1123(a) would unconditionally invalidate environmental law applicable to abandonment of property under a plan. That theory would therefore render the holding of this Court's *Midlantic* decision completely ineffective.

CONCLUSION

The petition for a writ of certiorari should be denied.

September 27, 2004

Respectfully submitted,

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